No. 12 Orig.

Reply Brf. of Kremer, Wisner & Harvey & Johnson for Petitioner

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IN THE

Supreme Court of the United States

NO. 12 ORIGINAL.

OCTOBER TERM, A. D. 1899.

Ex Parte in the matter of the Petition of the Union Steamboat Company, Petitioner.

BRIEF FOR PETITIONER IN REPLY.

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
O. W. JOHNSON,
Proctors for Petitioner.

Geo. Hornstein & Co., Printers, Chicago.

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It is true, as stated by the District Judge, that the decree prepared on behalf of the Union Steamboat Company included interest at seven per cent. per annum, because the court held that this was the rate of interest which was allowed by the courts of the State of Michigan.

Proctors for the Union Steamboat Company, under a misapprehension as to what the Statute of Michigan on the rate of interest was, accepted the construction placed upon it by the proctor for the intervenors, be-

cause they supposed that he was entirely familiar with the interest statutes of his own state.

Subsequently, however, when it was discovered that the legal rate of interest was five instead of seven per cent., the attention of the opposing proctors and of the court was called to this, and a request made to have it changed from seven to five per cent. The court, however, adhered to its finding of a rate of seven per cent.

The District Judge, in Article 8 of his answer refers to Article 4865, Section 6, of the laws of Michigan, as the law which permits the collection of interest at the rate of seven per cent. upon all decrees and judgments, and under this justifies the entering of the decree with interest at seven per cent. We contend that the act of October 3, 1899, repealed the act referred to by the District Judge, and that under this later act decrees draw interest at the rate of five and not seven per cent.

The Pleadings.

The Judge of the District Court answers that the state of the pleadings is such that the decree entered by him is the only one that could be properly entered under the mandate. Until the decision of this court was rendered, there was no occasion to consider any question of pleadings.

The history of the case is this: The final decision of the District Court was, that the "New York" was solely at fault for the collision and therefore liable for *all* the damages. The cross libel was then dismissed. From this decree the the "New York" appealed.

The Court of Appeals reversed the District Court and held the "Conemaugh" solely at fault, dismissed the libel and ordered a decree upon the cross libel.

It is contended that under the form of the decree offered by the Union Steamboat Company, the petitioner would obtain direct affirmative relief against the libelant in the sum of $6,651.28, and that such affirmative relief could not be had or obtained in this case because there are no pleadings on behalf of the Union Steamboat Company asking for it. Is this the fact?

The libelant appears here in the dual capacity of suing for its own damages and as bailee or trustee for damages to the cargo on board of the "Conemaugh."

To this libel an answer was filed by the Union Steamboat Company denying all liability and alleging that the "Conemaugh" was solely at fault for the collision.

After these first pleadings had been filed (page 11 of the record) permission was asked and leave granted by the court to the Union Steamboat Company to file a cross libel against the "Conemaugh" for the damages sustained by the "New York." The cross-libel was filed February 25, 1892 (Rec., p. 11), and is found on pages 12, 13, and 14.

No answer was ever filed to this cross libel. On page 213 of the record, however, is found a stipulation, signed by all the proctors in the case, which finds that the damages sustained by the propeller "New York," by reason of the collision, amount to $3,391.19. This was filed January 25, 1893, at a time

when the District Court had decided that the "New York" was solely at fault for the collision. All steps that might have been taken prior to that time, would have been entirely futile, because of the decision of the District Court, which made the Union Steamboat Company, as owner of the "New York," solely liable for all the damages, so that there would be no occasion to ask for process against the "Conemaugh" for any purpose, either in favor of the "New York" for her damages, or the damages sustained by the "Conemaugh's" cargo.

An appeal was prayed by the Union Steamboat Company from the decree of the District Court, and a trial *de novo* was had in the United States Circuit Court of Appeals.

This court reversed the decree of the District Court and found the "Conemaugh" solely at fault for the collision, dismissed the libel and the intervening petition and the "New York" was found and decreed to be entitled to recover her damages as against the "Conemaugh" by a decree *in personam*.

The signing of the stipulation finding the amount of the damages of the "New York" to be a certain amount, was practically an appearance on behalf of the libelant and placed the Union Steamboat Company in a position to have an affirmative decree entered against the Erie & Western Transportation Company under the cross libel and stipulation.

There was certainly no room for further proceedings in the interest of the Union Steamboat Company after this decision by the Circuit Court of Appeals, as the "New York" was held to be in no way liable for the damages sustained by the "Conemaugh"

or the owners of her cargo. Until the decision in this court there was no need of further pleadings.

We contend here that no further pleadings are necessary in the case because all of the parties are before the court, either as parties libelant or respondent.

The petitioner asks for no affirmative relief, further than to be permitted to recoup whatever it may have to pay beyond a moiety of the damages sustained by the intervenor for the cargo.

The libelant is certainly estopped from saying that so much of the cargo as is represented by it as bailee and trustee cannot recover against it, because it, the libelant, has not been made a party defendant by it, the libelant trustee.

The libelant cannot claim any benefit or advantage by reason of its dual position. It cannot, as libelant, say to itself as libelant bailee, that it will not pay one half of damages sustained by it as bailee of the cargo. It is as much liable as a party *libelant* in this suit as it would be as party *defendant*. It is as much before the court in one case as in the other, as much subject to the process and orders of the court, and we can see no advantage that could be gained by having the libelant also made a defendant in the same suit in which it is already one of the parties.

The objection made here is purely technical. All the equities in the case can be settled here now, as all the parties in interest are before the court.

It can be of no practical interest or benefit to supply further pleadings. All the defenses that have not been made can still be made before the decree is entered.

Upon this question of further pleadings the case of

the "Eleanora," 17 Blatch., 83, cited at length on page 7 of our brief filed with the petition herein, is directly in point.

See, also,

Leonard v. *Whitwill*, 10 Ben., 638.

The "*C. H. Foster*," 1 Fed. Rep., 733, and the cases cited in our brief.

The case of *The* "*Manitoba*," 122 U. S., 97, in many particulars resembles the case at bar.

In that case the owners of the propeller libeled the "Manitaba" for the following damages:

The value of the Comet	$30,000
The value of her cargo	35,000
The value of her freight	5,125

The court held both vessels at fault, divided the damages, and in doing so added together the total damages claimed by the libelant, and to these the damages sustained by the "Manitoba" and then entered a decree in favor of the libelant for one-half of these against the "Manitoba." The amount recovered, however, was less than the amount awarded, because of the limited liability proceedings which had been taken in the interests of the "Manitoba."

It does not appear in that case that any pleadings were filed by the owners of the "Manitoba" against the owners of the "Comet" to recover the damages sustained by the owners of the "Comet's" cargo. We doubt this ever having been done in any case. We certainly have had no such experience, nor have we been able to find any case of the kind in the books.

Libelant furnishes no precedent or authority in point to sustain the position that the court cannot now under

the present state of the pleadings grant the relief asked and do full and perfect justice to all the parties in interest.

In the case at bar, the decree ("Exhibit C") provides for the payment of all the damages of the intervenors, namely $19,841.56, by the Union Steamboat Company, and for a further recovery by the libelant from the Union Steamboat Company of the sum of $12,976.38, which, together, amounts to the sum of $32,817.94, one-half of the total damages sustained in this case. This leaves the libelant to account to the owners of the cargo represented by it as trustee either for the whole or a part of the damages, if by any private arrangement or contract its liability was lessened.

The case of *The "Juniata,"* 93 U. S., 337, cited by the Judge of the District Court as supporting the decree entered in this case, is not in point, because in that case, the United States as owner of a certain scow filed *a separate* libel against the "Juniata" alone, *to which libel the original libelant was in no way made a party;* therefore, the court could not, in the case of the *United States* v. *The "Juniata"* enter a decree against Pursglove, who was the libelant in the original collision case suing for the loss of the steam tug "Neafie." He had not been made party to the case of the United States in any way, and no decree could therefore be entered against him, until under rule 59, or a similar rule, he had been made party at the request of the "Juniata."

This case would be in point if the owners of the cargo had filed an original libel against the "New York" alone.

Here the owners of the cargo are not in court as libelants but are represented by the owner of the "Conemaugh." The owner of the "Conemaugh," as libelant, after the court finds that the libelant and claimant are jointly liable each for a moiety of the damages, will be estopped from saying that this amount can not be recovered of it, because it, the libelant, was not made a party defendant by the owners of the cargo.

In other words, the libelant cannot defeat the claim of *libelant as trustee* because as such trustee it did not make the libelant a party defendant. Neither can the libelant defeat the claim of the claimants for contribution because the latter did not make the libelant a party defendant.

The object of a pleading is to raise an issue. In a case of this kind after the court had found both vessels at fault, all issues were determined and no new issues could be raised by any further pleadings that could be filed. The right of contribution existed of course, and could be enforced under the pleadings then in the case. Pleadings could serve no useful purpose, and would therefore be only an unnecessary incumbrance on the record.

The defense under the contract or bill of lading is one that must come from the libelant. When the intervenors filed their petitions it was proper for the libelant to answer these. if it had any defenses to offer. The Union Steamboat Company filed its answers to these petitions, denying all liability for the collison or any damage arising out of it.

Courts of admiralty have always favored the directest course and simplest methods in arriving at the dis-

tribution and contribution of damages in collision cases.

It has been held in this country in the case of *Ebert* v. *Schr.* "*Reuben Doud*," 3 Fed. Rep., 520, following the case of *The* "*Sapphire*," 18 Wal., 51, that a cross libel is not strictly necessary, but if it appear from the answer that the vessel libeled has sustained damages, the amount of these damages can be recouped without the filing of a cross libel.

Courts of admiralty in England have been equally liberal in this respect. *The* "*Seringapatim*," 3 Wm. Rob., 38.

In this case the cross action had been abandoned and after the court had held both vessels at fault, Dr. Lushington in his opinion says:

"Taking all the circumstances of the case into my consideration, the course which I shall adopt is this: I shall not depart from my original decree, but shall confine the reference to the registrar and merchants to the amount of the compensation to which the owners of the 'Harriet' are entitled. At the same time, I shall not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages sustained by the owners of the 'Seringapatim.'"

With all the parties before the court we claim that no further or other pleadings are necessary.

The Rule as to Damages When Two Vessels are at Fault.

It is now well settled that in cases of mutual fault, the practice of cross decrees that prevails in chancery does not obtain in the courts of admiralty either in this country or in England.

In fact the principle of cross decrees is opposed to the rule which the Supreme Court adopted in the cases of *The North Star* and *Chatahoochee.*

This question, cross decrees, was discussed at length in the House of Lords in the case of *Stormvaart M. N.* v. *Peninsular & O. S. N. Co.*, 7 App. Cas., 795, wherein it was held that the owner of the "Khedive" was not entitled to the benefit of the Act of Parliament limiting the liability of vessel owners, because the rule of the division of damages in admiralty was firmly settled that in all cases of mutual fault the party sustaining the greater damages was entitled to a decree for a moiety of his damages less a moiety of the damages of the other vessel, and expressly deciding that the rule of cross decrees did not apply, and one decree only was necessary.

If by the clause of the bill of lading, the intervenors are unable to collect any part of the damage of the "Conemaugh," then so much of the damage as the "Conemaugh" would be liable for becomes released, but this release of the "Conemaugh" can not operate to increase the burden or the liability of the "New York." This would be contrary to justice and to the rule laid down in *North Star* and *Chattahoochee* cases.

If either of the parties must suffer under these cir-

cumstances, it ought to be the party that has voluntarily released its claim against one of the wrongdoers, and not the other wrongdoer, who, but for the clause, would pay but one-half of the damages.

This increase of liability was not contemplated. It was not intended. It can not bind the "New York."

It is also contended by the libelant that it became the duty of the "New York" to bring in the "Conemaugh" or her owners under rule 59 as a party defendant in order to recover against her in this case.

A careful reading of rule 59 will show conclusively that it never was intended to cover any such case as we have here. The rule provides as follows:

"In a suit for damage by collision, the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition on oath, presented before or *at the time of answering the libel*, or within such further time as the court may allow, and containing suitable allegations, *showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage*, pray that process be issued against such vessel or party to that end, such process may be issued, and if duly served such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shal answer the petition; the claimant of such vessel or such new party shall answer the libel and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain."

It is perfectly apparent that this rule was intended to enable one defendant to bring in a third party as an additional defendant, and had nothing whatever to

do with making a party a defendant when that party was already in court as a party libelant.

The case of *The* "*Beaconsfield*," 158 U. S., 303, is also relied on as an authority in this case as showing that rule 59 applies. We contend that that case has no application whatever, for in that case the master of the "Beaconsfield" filed a libel against the "Britannia" *alone* for damages to the "Beaconsfield's" cargo. The "Beaconsfield" was not joined as a party defendant, and in order to bring her into court, the owners of the "Britannia" filed a petition under rule 59. The "Beaconsfield" not being a party to the suit, the "Britannia" was compelled to resort to this method of making her a party.

In that case the master and owner of the "Beaconsfield" representing her cargo in the suit brought against the "Britannia" recovered a decree for but half of the damages of the cargo against the "Britannia" and a decree for the other half against the "Beaconsfield," their own ship.

Applying the rule in this case to the case at bar, the libelant cannot recover on account of the cargo of the "Conemaugh," a decree for more than one-half of the amount of the cargo damage and must bear the other half itself, and this can be carried out as readily in this proceeding by the court as it was done in the "Beaconsfield" case.

The decree can provide as in that the libelant pay damages to the owners of the cargo represented by it.

The rule in admiralty in case of a division of damages is well settled by the decision of this court and also by the House of Lords in England. See:

North Star, 106 U. S., 17.

Manitoba, 122 U. S., 97.

Stormvaart M. M. v. *Peninsular & O. S. N. Co.*, 7 App. Cas., 795.

Albert Dumois, decided April 9, 1900, by this court and not yet reported.

In all of these cases, the rule is stated to be, that in cases where the collision occurred through the mutual fault of two vessels the damage done to both vessels should be added together in one sum, and equally divided, and a decree pronounced in favor of the vessel which suffered most against the vessel which suffered least for one half the difference between the amounts of their respective losses.

This has been done even when under the Limited Liability Act of 1851 the claimants could not have recovered if they had brought suit against the owners of the sunken vessel, and in the case of *The "Chattahoochee,"* 173 U. S., 549, in which the owners of the cargo of the steamer lost could not have recovered from the lost steamer because of the Act of Congress of February 13, 1893, known as the "Harter Act."

These decisions are again affirmed in the case of *The "Dumois."*

In the case at bar the libelant contends that the owners of the cargo are not entitled to recover because of the clause in the bill of lading (Rec., 270), which gave to the owner of the "Conemaugh" the benefit of any insurance, however effected, covering the cargo, and that under this clause in the bill of lading, there was no liability for any part of the cargo damages, at least so far as they are represented by the intervenors, the insurance companies, and that the cargo insurers have no claim against the "Conemaugh," and that there-

fore the owners of the "New York" can not recoup any part of the damages that they may have paid to the intervenors of the cargo in this case.

We contend as against that, that the rights of the libelant are no higher under this bill of lading than they would have been under the act of Congress of 1893, and that this exemption which might defeat a direct action against the libelant can not be utilized to reduce its liability in a case of this kind, any more than the act of 1851 and the act of 1893 did in the cases of *The* "*North Star*" and *The* "*Chatahoochee*," respectively.

In the case of *The* "*Chatahoochee*" as cited by this court in the case of *The* "*Dumois*," the court said, referring to the case of *The* "*Chatahoochee*":

"We held in that case that the sunken vessel was not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability had been fixed upon the principle of an equal division of damages."

We believe that under this bill of lading the rules should be the same as in the case of *The* "*North Star*" and *The* "*Chatahoochee*," as it is based upon the same principle.

The Clause in the Conemaugh's Bill of Lading, the Effect of Which is to Release Her From Any Claim of Her Cargo.

On page 270 of the record, in the "Conemaugh's" bill of lading, there appears the following clause:

"And the person or party liable, or who might sustain loss in consequence of owning or chartering or being interested in or as to such vessel, shall have any insurance, however effected, on, as to, or covering the property lost or damaged, and all benefit and advantage to be derived therefrom."

A similar clause to this was held to operate as a release of the carrier from all liability, when the insurance obtained by the shipper has been collected by him.

E. & W. Trans. Co. v. *Phœnix Ins. Co.*, 117 U. S., 312.

Inman v. *S. C. Ry. Co.*, 129 U. S., 128.

This clause in the bill of lading, if invoked in this case for the purpose of releasing the "Conemaugh" at the expense of the "New York," or for any purpose, if valid, operates to defeat all right of action on the part of the cargo owner against either of the vessels in this case.

The moment that the shipper of the "Conemaugh's" cargo sustained damages, he had a right of action for them. In the light of the decisions of this court, this right of action existed against the "New York" and the "Conemaugh" jointly and severally.

The clause in the bill of lading had no vitality until called into life by the collision, then it became operative, because of the existence of a claim for damages for

which the vessel might be held liable, it remained suspended even then until the insurance was actually collected. This done it released the owners of the "Conemaugh" from any and all liability. By doing so we contend it not alone released her, but also released the "New York" under the familiar rule of law that the release of one joint *tort feasor* releases all.

This has been held to be the rule at common law where the right of action was joint and several, as in this case.

Even when the release purports to release but one, and is not intended to release the other *tort feasors*, it operates to do so, notwithstanding.

In the case of *Lovejoy* v. *Murray*, 3 Wal., 1, the court on page 19 says:

"But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment and trespass offered as a bar in an action against another joint trespasser who was not a party to the first judgment."

In the case of *Chapin* v. *C. & E. I. R. R. Co.*, 18 Ill. App., 47, there was a collision between two railroad trains. One of the railroad companies made a settlement with the injured party and was released by the terms of the settlement. The court held in that case that this released the other railroad company, which was jointly and severally liable with the one released.

In the case of *Barret* v. *Third Ave. R. R. Co.*, 45 N. Y., on page 635, the court lays down this rule:

"The rule is, that a party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and that an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, on one, of two or more joint *tort feasors*, is a discharge of all. (*Knickerbocker* v. *Colver and Hawes*, 8 Cow., Ill.; *Livingston* v. *Bishop*, 1 J. R., 290; *Ruble* v. *Turner*, 2 Hen. & Munf., 38; *Bronson* v. *Fitzhugh*, 1 Hill, 185.)"

See also:

Woods v. *Pangburn*, 75 N. Y., 495.

Bronson v. *Fitzhugh*, 1 Hill, 185.

Senthu v. *Phil. Traction Co.*, 125 Pa. St., 497.

Long v. *Long*, 57 Iowa, 497.

Tomkins v. *Clay St. H. R. R. Co.*, 66 Cal., 163.

Brown v. *City of Cambridge*, 3 Allen, 474.

Liddy v. *Barney*, N. E. Rep., Vol. 2, No. 1, page 107.

Goss v. *Ellison*, 136 Mass., 503.

20 Am. & Eng. Encyc., 765, and cases there cited.

If the clause operates as a release of the owners of the "Conemaugh," it also and in the same way releases the owners of the "New York," at least from the claim represented by the intervenors, for they bring themselves, as insurers of the cargo, directly within the clause of the bill of lading as construed by this court in *E. & W. Tr. Co.* v. *Phœnix Ins. Co.*

Whether the bill of lading releases the "Conemaugh" or not, the "New York" ought in no case

to be made to pay more than one-half of the damages arising out of this collision.

Should the court hold that further pleadings are necessary to properly do this we pray now for leave to file such additional pleadings or, to amend such as are now filed in the case, as may be necessary.

We therefore respectfully maintain that a writ of mandamus, or some other direction be given, setting aside the decree entered in this case by the District Court and directing by mandate such further proceedings as shall be in accordance with law and practice and the opinion of this court.

Respectfully submitted.

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
W. O. JOHNSON,
Proctors for Petitioners.

May, 1900.

No. 12 Orig.
Brf. of Canfield for Intervening Underwriters

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 12, Original.

EX PARTE, IN THE MATTER OF THE UNION STEAMBOAT COMPANY, PETITIONER.

Brief for intervening Underwriter on the CONEMAUGH'S cargo in support of the answer of the Judge of the District Court for the Eastern District of Michigan to the order to show cause why a writ of mandamus should not be issued.

F. H. CANFIELD,
Counsel for Intervening Underwriters.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 12, Original.

EX PARTE. IN THE MATTER OF THE PETITION OF THE UNION STEAMBOAT COMPANY, PETITIONER.

Brief for the Underwriters on the cargo of the Propeller "Conemaugh".

When the principal case of the Erie & Western Transportation Company, owner of the propeller Conemaugh, and intervening underwriters on her cargo vs. the Union Steamboat Company, claimant, was argued before this Court, it was insisted in behalf of the underwriters that if the New York was in fault for the collision, she is liable to said underwriters for the full amount of their damages, although the Conemaugh was also in fault, the established rule being that the owner or underwriter on cargo, in cases of collision brought about by the mutual fault of two vessels, has the right to sue either or both of the wrongdoers, and to recover full satisfaction from either or both.

The Alabama and the Gamecock, 92 U. S., 695.
The Virginia Ehrman, 97 U. S., 309-317.
The Atlas, 93 U. S., 312.
The Beaconsfield, 158 U. S., 303.
The Juniata, 93 U. S., 337.

This contention on the part of the underwriters was fully sustained by the Court. In its opinion, delivered by, Mr. Justice Brown, the Court said:

"The final question arises upon the insistence of the "underwriters of the Conemaugh's cargo, that they are "entitled to a recovery to the full amount of their dam- "ages against the New York, notwithstanding the Cone- "maugh may also be in fault for the collision. They are "correct in this contention. Indeed, this Court has al- "ready so decided in the case of *The Atlas*, 93 U. S., 302, "315, 317. This was a libel against the Atlas by an insurer "of the cargo of a canal boat in tow of the steam tug Kate, "whereby the canal boat and her cargo were lost. It was "insisted by the claimant that, as the libelant had failed "to make the Kate a party, and as both vessels were found "to be in fault for the collision, there could be a recovery "of only a moiety of the damages. The case of *The Milan*, "Lush., 388, was confidently relied upon as an authority. "This court, however, was of opinion that a plaintiff, who "has suffered a loss by the negligence of two parties, was "at liberty, both at common law and in admiralty, to sue "both wrongdoers or either one of them at his election, "and 'it is equally clear, that, if he did not contribute to "the disaster, he is entitled to judgment in either case for "the full amount of his loss. He may proceed against all "the wrongdoers jointly, or he may sue them all or any "one of them separately. * * * Co-wrongdoers, not "parties to the suit, cannot be decreed to pay any portion "of the damage adjudged to the libelant, nor is it a ques- "tion in this case whether the party served may have pro- "cess to compel the other wrongdoers to appear and re- "spond to the alleged wrongful act.' A like ruling was "made in *The Juniata*, 93 U. S., 337, in which a libel was "filed by the United States as owner of the cargo of a flat- "boat in tow of one of two vessels."

"The decree of the Court of Appeals is therefore re- "versed and the case remanded to the District Court for "the Eastern District of Michigan for further proceedings "in consonance with this opinion."

175 U. S., 187.

The right of the underwriters to recover the full amount of their damages from the New York is not questioned. It was fully conceded by the proctors for the petitioner, and such payment is provided for in the decree which they presented to the District Court and asked to have entered.

The decree which has been entered by the District Court under the mandate awards to the cargo underwriters the full amount of their damages against the New York, and is, therefore, so far as it affects them, strictly in accordance with the mandate, and in consonance with the opinion, of this Court. This application for a mandamus to change the decree cannot affect their rights, except in respect to the rate of interest which the decree should bear; and this brief is therefore confined to that question.

This court, by its mandate, directed the District Court to enter a decree in consonance with the opinion of this Court, "*with interest from July* 3, 1896, *until paid, at the* "*same rate per annum that decrees bear in the courts of the* "*State of Michigan.*"

The statute of the State by which the rate of interest is prescribed is to be found in Chapter 122, 2 Compiled Laws of Michigan of 1897, page 1533, which is as follows:

"CHAPTER 122.—MONEY OF ACCOUNT AND INTEREST."

"OF—MONEY OF ACCOUNT, AND OF THE INTEREST ON MONEY, AND ON JUDGMENTS, VERDICTS, ETC."

"(4854) Section 1. The money of account of this State, shall be the dollar, cent, and mill; and all accounts in the public offices, and all other public accounts, and all proceedings in courts, shall be kept and had in conformity with this regulation."

"(4855) Sec. 2. Nothing contained in the preceding section shall vitiate or affect any account, charge or en-

ury, originally made, or any note, bond, or other instrument expressed in any other money of account; but the same shall be reduced to dollars and parts of a dollar, as hereinbefore directed, in any suit thereupon."

"AN ACT to regulate the interest of money on account, interest on money judgments, verdicts, etc."

"(4856) Sec. 1. *The People of the State of Michigan enact*, that the interest of money shall be at the rate of six dollars upon one hundred dollars for a year, and at the same rate for greater or less sum, and for a longer or shorter time, except that in all cases, it shall be lawful for the parties to stipulate in writing, for the payment of any rate of interest not exceeding eight per cent per annum: Provided, That this act shall not apply to existing contracts whether the same be either due, not due, or part due."

"(4857) Sec. 2. No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

"(4858) Sec. 3. Whenever it shall satisfactorily appear by the admission of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of this act, the court shall declare the interest thereon to be void."

Sec. 4 repeals "all acts or parts of acts contravening the provisions of this act."

(4859) Sec. 1 provides for interest on installments of interest, due and unpaid.

(4860) Sec. 1 relates to interest on notes, etc., payable out of the State.

(4861) Sec. 2 relates to the same subject.

(4862) Sec. 3 provides that parties loaning money may take interest authorized by the State, without reference to law of place where payable.

(4863) Sec. 4 provides that interest on loans, payable in any other State, shall not be affected by the laws thereof.

(4864) Sec. 5 provides that negotiable notes shall not be affected by usurious interest.

"INTEREST ON JUDGMENTS, VERDICTS, ETC."

(4865) Sec. 6. "Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the form or cause of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of seven per centum per annum: Provided, That on a judgment rendered on any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument, not exceeding ten per centum."

(4866) Sec. 7. "In all actions founded on contracts express or implied, whenever in the execution thereof any amount in money shall be liquidated or ascertained in favor of either party, by verdict, report of referees, award of arbitrators, or by assessment made by the clerk of the court or by any other mode of assessment according to law, it shall be lawful unless such verdict, report, award or assessment shall be set aside, to allow and receive interest upon such amount so ascertained or liquidated, until payment thereof, or until judgment shall be thereupon rendered; and in making up and recording such judgment, the interest on such amount shall be added thereto, and included in the judgment."

Section 4865, above quoted (being Sec. 1587 of Howell's Ann. Stats.), is the only section which in terms provides for interest on judgments and decrees. It has been em-

bodied in, and has formed a part of the laws of the State as a distinct and independent section in substantially the same form from 1838 to the present time. It appears in the Revised Statutes of 1846, and in the various compilations of the laws of the State "*in force*," made under legislative authority, in 1857, 1871, 1882, and finally in the compilation of 1897. The question is now raised for the first time by the counsel for the petitioner in this case whether said section was repealed or amended by the Act of 1891, which is itself embodied in and forms a part of Chapter 122 of the Laws of 1897.

I insist that section 4865 remains *in force*, not affected by the Act of 1891 or the amendment thereto of 1899, and that by virtue of its provisions the rate of interest which judgments and decrees of the courts of the State of Michigan bear is seven per cent per annum. This conclusion follows from the decisions of the Supreme Court of the State, as well as from the *practical* construction which the statute has received.

First. The Supreme Court of Michigan, in *Hayden vs. Heffernan*, 99 *Mich.*, 262, decided in 1894, three years after the Act of 1891 was adopted, recognizes this section of the Compiled Laws relating to interest on judgments and decrees as being still in force. That case involved the question whether a judgment for costs in favor of an appellant in an appeal from the Probate Court would bear interest. The Court said: "A judgment for costs is as much a judg-"ment as any other, and is, therefore, within the terms of "the statute. * * * Interest upon claims allowed "against the estates of deceased persons may be claimed "under Section 1597, How. Stat. [Sec. 4865, Comp. L. "1897], which is broad enough to cover the present case."

University Regents vs. Auditor-General, 109 Mich., 134.

Second. The *practical construction* which has been given to the statutes of Michigan relating to interest since the Act of 1891 was adopted shows that Sec. 1597, How. Stat., is still in force and not affected by the Act of 1891. It is made the duty of the Secretary of State of Michigan to publish the statutes adopted by the legislature at each session, and to include in the published volume a list of the sections and chapters of the annotated statutes which were amended or repealed. Such lists appear in each volume of the statutes, and in the index to the Acts of 1891, page 443. Sections 1595 to 1596, inclusive, are mentioned as being repealed by the Act of 1891, to which we have referred.

Sec. 1597, How. Stat., as already shown, is included in the compilation of the statutes of Michigan of 1897, and it there appears as Section 4865.

The compilation of 1897 was made pursuant to an Act of the Legislature, approved June 4, 1895.

See Public Acts of Mich., p. 579.

Section 1, of which provides: "That all the general laws *in force* in this State, and all general acts and parts of acts passed by the present legislature which shall be approved and become laws shall be collected and compiled without alteration under their appropriate heads and titles," etc.

The statute provides for the appointment of two commissioners to examine and certify that the statutes as compiled are a correct compilation of all general laws *in force*.

See Commissioners' Certificate and Preface, Vol. 1. Compl. Laws of 1897.

These commissioners, clearly, did not think that the Act of 1891 in any manner affected the previous statutes relating to interest on judgments and decrees.

In view of the fact that said Sec. 1597, relating to interest on judgment and decrees, is included in the compilation of 1897, and that said compilation has been approved and

certified to by the commissioners as containing the general laws of the State *in force;* that it has been approved by the legislature itself; and that it has been accepted by the courts of Michigan, as well as all branches of the State government, as being a correct compilation of the laws *in force*, we submit that this court will not hesitate to conclude that Sec. 4865, 2 Compl. Laws of 1897 (being Sec. 1597, How. Stat.), remains *in force*, and that the court below properly entered a decree in this case for interest at the rate of seven per cent per annum.

a. The Act of 1891 relates only to interest on *contracts*, and not to interest on judgments and decrees.

By Section 1 it provides that the interest of money shall be at the rate of six per cent, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding eight per cent per annum, with the proviso that the Act shall not apply to existing contracts.

Sec. 2 provides that the taking of usury shall not render the contract void.

Sec. 3 makes it the duty of Court, if it shall appear that any contract has been taken in violation of the Act, to declare the interest thereon void.

Sec. 4 repeals all Acts or parts of Acts *contravening* the provisions of this Act.

The Act contains nothing which does not aptly relate to interest on contracts. It is true that interest on judgments and verdicts are mentioned in the title of the Act; but nowhere else. The title cannot extend the effect of the Act beyond the scope of the text or body of the Act itself.

The Legislature of the State knew that by the common law, judgments and decrees do not bear interest. It was, therefore, careful to provide expressly, by a special section of the statute, that judgments in the courts of Michigan

should bear interest at a specified rate. This was done, as I have shown, as early as 1838. And this *special* section has been retained in substantially the same identical form *and under a special heading or title*, through every revision and every compilation of the statutes of the State since 1838, including the revision of 1846 and the compilations of 1857, 1871 and 1882, as well as the compilation of 1897, which was made six years after the Act of 1891 was adopted.

It will be observed that section 1 of the Act of 1891 is substantially the same as section 3 of Chapter 6 of the Revised Statutes of 1838, and Section 3 of Chapter 34 of the Revised Statutes of 1846, which is preserved in the subsequent compilations of 1857, 1871 and 1882, except as to the *rate* of interest.

Now, if Section 1 of the Act of 1891 is sufficient to include judgments and decrees, why was it not discovered that Section 3 of the law, as it had previously existed, also included judgments and decrees? Why was the Legislature careful to preserve for more than sixty years a separate section which *expressly* provides for interest on judgments and decrees, if such an express provision was not regarded as necessary? The very fact that the section expressly relating to interest on judgments and decrees was originally enacted, and that it was re-enacted in the subsequent revision, and that it has been preserved in the several compilations which have since been made, shows that the Legislature did not intend that the Act of 1891 should relate to judgments and decrees.

b. It cannot be claimed that the Act of 1891 affects interest on "judgments, verdicts and decrees" simply because those words are included in its title.

1. As already stated, the title of the Act cannot extend its effect or meaning beyond the scope of the text or body of the Act itself.

2. The title of the Act of 1891 is substantially identical with the title of the previous statutes on the subject of interest. If, in the statute of 1838, which has substantially the same title as the Act of 1891, the Legislature thought it necessary to provide for interest on judgments and decrees by a special section, why did not the Legislature make a similar express provision in the Act of 1891, if *that* Act was intended to relate, in any manner, to judgments and decrees? In other words, if the Legislature intended that the Act of 1891 should relate to judgments and decrees, why did it not say so in the body of the Act?

Further argument is unnecessary, but a review of the legislation of the State will show that the Legislature has *always* carefully preserved the section relating to interest on judgments and decrees (4965, Comp. L. 1897, 1597 Howell's Ann. Stats.), and that that section remains *in force;* and that judgments and decrees in the courts of Michigan still bear interest at the rate of seven per cent per annum.

a. It cannot be contended that the Legislature intended to *repeal* the sections of the former statute allowing interest on judgments, verdicts and decrees. The repealing clause of the Act of 1891 repeals only such acts and parts of acts which *contravene* the provisions of that act Sec. 4865, Compl. Laws of 1897, *does not* contravene the provisions of the Act of 1891. The former relates to interest on judgments and decrees, while the latter relates to interest on contracts.

Repeals by implication are not favored, the rule being that there must be a positive repugnancy between the provisions of the new law and those of the old to work a repeal by implication.

Wood vs. U. S., 16 Peters, 342.
Chew Heong vs. U. S., 112 U. S., 549.
Ross vs. Wenie, 157 U. S., 46.

In *Rosencrans vs. U. S.*, 165 *U. S.*, 257-262, it is said:

"Where Congress has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

This is peculiarly applicable to the present case. The Legislature has *expressly legislated* in respect to interest on judgments and decrees; and the subsequent legislation does not, in express terms, refer to *such* interest. Therefore, the former legislation cannot be considered as having been repealed.

This rule of construction has been followed by the Supreme Court of Michigan in many cases.

In *People vs. Hanrahan*, 75 *Mich.*, 622, it is said:

"Repeal by implication is never permitted if it can be avoided by any reasonable construction of the statutes. If both acts can be given full force without conflicting with each other, or if the latter act is merely affirmative, or auxiliary, and not inconsistent, both must stand, and the former is not repealed."

Gordon vs. People, 44 Mich., 485.
Canal & Railway Co. vs. Attorney-General, 79 Mich., 353.
Black on Interpretation of Statutes, 112.

And see particularly *University Regents vs. Auditor-General*, 109 *Mich.*, 134, which involved the construction of the statutes relating to interest.

c. The Act of 1891 did not *amend* section of the former statute referred to, relating to interest on judgments and decrees.

It does not expressly amend those sections, and under Sec. 25, Article IV., of the Constitution of Michigan, there can be no such thing as an amendment of a former law by implication.

That section declares:

"No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length."

See 1 Compl. Laws of Mich., of 1897, p. 83.

Therefore, to hold that the Act of 1891 was intended to amend sections of former law relating to interest on judgments and decrees, will render the act unconstitutional.

There are various special sections of the Compiled Laws of Michigan relating to interest, which are distinct from the general provisions as to interest upon contracts. Thus, in addition to the special section relating to interest on judgments and decrees, there is Section 1195 (Howell's, 5361), which provides for interest on the educational funds of the State; also Section 1196 (Howell's, 5360), providing for interest on the University fund, and that the rate shall be seven per cent; and which the Supreme Court, in *University Regents vs. Auditor-General*, 109 *Mich.*, 134, has expressly decided, has not been affected by the Act of 1891. There is also Section 10470 (Howell's, 8139), respecting interest on judgments rendered against incorporated banks, which provides that the plaintiff in such judgments shall recover "*ten* per cent a year, instead of the rate established by law;" and Section 3912, which provides that money due for delinquent taxes shall, after a certain date, bear interest at the rate of eight per cent. All of these statutes existed long prior to 1891. No one will contend that any of them were either amended or repealed by the Act of 1891. None of them *contravene* the Act of 1891. The same is true of the section relating to interest on judgments and decrees.

Although there is no necessity for further argument on the part of the cargo underwriters, I beg to suggest that

the decree entered by the District Judge is the only decree which could be properly entered, if the mandate and the opinion of this Court is considered in the light of well established rules of practice in admiralty cases.

1. This Court has decided that the New York, being found in fault, must pay to the cargo underwriters the full amount of their damages. What the petitioner asks is, to be allowed to recoup from the Conemaugh, one-half of what it may have to pay to these underwriters. That such a decree would be an affirmative decree clearly appears from an examination of the figures showing the damages to the respective parties to the suit, viz.:

Erie & Western Transportation Co., as owners of the Conemaugh		$30,508.46
Erie & Western Trans. Co., as trustee for underwriters other than intervenors		19,627.67
Underwriters who have intervened, viz.:		
British & Foreign Marine Ins. Co., Ltd.	$2,421.84	
Ins. Co. of North America	7,950.09	
Union Marine Ins. Co.	8,553.06	
Marine Ins. Co., Limited	916.57	
		$19,841.56
Union Steamboat Co., for damage to New York		$4,341.80

Now, if the damages to the two steamers are divided, the Erie & Western Transportation Co. would recover one-half of the damages to the Conemaugh, to-wit: $15,254.23, less one-half the damage to the New York, to-wit: $2,170.90, or $13,083.33; but if the petitioner is permitted to recoup half of what it is liable to pay the cargo underwriters, to-wit: $19,734.61, in addition to half of the damage to the New York, it will result in an affirmative decree in its favor against the Erie & Western Transportation Co. for $6,651.28, besides interest. Of course it cannot ask for such a recoupment until it has paid the cargo loss. But surely

the mandate of this Court does not direct the entry of such a decree, nor would such a decree be in accordance with the rules of admiralty practice.

(a) A respondent or claimant cannot have affirmative relief unless he asks for it under a cross libel. An answer cannot be made to serve the purposes of a cross libel, even if the parties expressly so stipulate. This was decided in *Ward vs. Chamberlain*, 21 How., 572, where it was held that the respondent in the original suit, if he wishes to obtain the benefit of a cross libel, should file one and take out process and serve it in the usual way.

In this case no process was taken out under the cross libel, nor was it waived by appearance, or otherwise, on the part of the Conemaugh's owner. It, therefore, never became a valid, living pleading. The whole history of the case, from the day it was filed, shows it was treated as abandoned.

(b) Courts of admiralty administer relief, *secundum allegata et probata*. Relief cannot be decreed in the absence of a proper pleading, any more than it can be decreed in the absence of the necessary proof. Both pleading and proof are necessary, and these must correspond.

The necessity of a cross libel, in order to enable the respondent to obtain affirmative relief, is recognized in *The Saphire*, 18 Wallace, 51, and by implication at least, in *The Atlas*, 93 U. S., 302. And such is the practice in the District Courts:

The Reuben Doud, 3 Fed., 520.
The Ping-On, 11 Fed., 607.
Gillingham vs. Tow Boat Co., 40 Fed., 651.

In this respect the admiralty practice is like the practice in equity; where the defendant must file a cross bill, in order to obtain affirmative relief.

Transportation Co. vs. Coal Co., 42 Fed., 920.

If the respondent does not file a cross libel, he must institute another independent suit, if he wishes to recoup or recover damages against the original libelant.

The Juniatta, 93 U. S., 337.

(c) Even if the cross libel in this case can be regarded as effectual for any purpose, it lays no foundation for a decree of recoupment *in personam* against the owner of the Conemaugh, for the reason that the cross libel is *in rem* against the vessel alone. A decree *in personam* cannot be had against the owner of a vessel under a libel *in rem*, nor can the owner be joined as a respondent in a suit for collision against the vessel. *The Corsair*, 145 U. S., 335. This is true, whether the libel is a cross libel or an original libel.

(d) But if these objections can be overlooked, there is another which is fatal to *any* claim which can be made under the cross libel, and that is the fact that it was dismissed by order of the District Court, on the 16th day of May, 1895 (see printed Record in this Court, page 198), and no appeal was taken from that order, which therefore, under the familiar case of *The Dove*, 91 U. S., 381, became *res judicata* of any claim which the New York might have against the Conemaugh, growing out of this collision.

The fact that the owner of the Conemaugh was before the Court as libelant does not afford any ground for a decree against such owner, in favor of the petitioner. This necessarily follows from the decision in the case of *The Juniatta*, above cited.

It appears that the petitioner took no proceeding against the owner of the Conemaugh, to compel it to respond for any claim for damages under General Admiralty Rule 59. Had it done so, then under the case of the *Beaconsfield*, 158 U. S., 303, a different question might be presented. No such petition having been filed, under the decision in the

Beaconsfield, there is no suit against the owner of the Conemaugh, upon which a decree can be rendered.

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